No. 21767

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of WATERMAN STEAMSHIP CORPORATION, a corporation, owner of the vessel SS CHICKASAW, for exoneration from or limitation of liability,

---

GAY COTTONS, INC., *et al.*,
Cargo Claimants,

SHALOM BABY WEAR,
Cargo Claimant,

UNITED STATES OF AMERICA,
Cargo Claimant.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

APPELLEE'S BRIEF.

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Preliminary.

In limitation of liability, the issue is "privity and knowledge," and "privity like knowledge turns on the facts of particular cases." *Coryell v. Phipps,* 63 S. Ct. 291, 294; 317 U.S. 406, 411 (1943).

In this case we take the facts from the findings. Appellant (Waterman) has not urged that the findings are erroneous: rather they urge that under the findings they should prevail.

The findings are that the ship was unseaworthy because, ". . . the fathometer was not in a reliable working condition" [Find. 4, Clk. Tr. p. 846]; that, "Due diligence was not exercised to make the SS CHICKASAW seaworthy and . . . the unseaworthiness of the fathometer occurred with the privity, fault and knowledge of the Waterman Steamship Corporation" [Find. 6, Clk. Tr. p. 848]. These findings seem conclusive: there is no claim that they are erroneous. Nonetheless, the points argued will be considered in detail under "Argument" below.

Despite the limited scope of this appeal, appellants start with facts taken, not from the findings, but the evidence. They describe, in some detail the various "surveys" and "inspections" to which the CHICKASAW was subjected (App. Op. Br. pp. 2 and 3). That description is incomplete and misleading. An erroneous understanding of the evidence can lead to error in interpreting the findings. We also start, therefore, with a full statement of the case as disclosed by the evidence. We will then pass to the errors asserted.

I.

Appellee's Statement of the Case.

This case involves the stranding of a freighter which was being operated as a common carrier between the United States and various ports in the Far East. On February 7, 1962, the CHICKASAW, returning from Japan, carrying some two million dollars of cargo,* ran into the center of an island some forty miles in length, and four hundred feet high. The hour was approximately 7 p.m. The evening was dark and rainy. For two days, the ship had been unable to obtain a celestial ob-

*Figures are from claims: damages have not yet been tried.

servation [Rep. Tr. p. 299]. Visibility was poor and the island was struck before it was seen [Rep. Tr. p. 443]. Like countless mariners and countless ships, the CHICKASAW was making a landfall under conditions of restricted visibility and poor weather.

A modern vessel like the CHICKASAW ordinarily has at least four devices which would have enabled her to locate her position accurately under these conditions. There is the radar, the fathometer, the deep sea sounding machine, and radio direction finder. On February 7, as the court found, and the evidence established, all these devices were unavailable. Here is the detail:

First: The fathometer was inoperative. The fathometer is a device which sends a sound signal out through the water by means of a diaphragm mounted on the bottom of the ship. The echo of that sound signal from the bottom is received by a device also fitted on the bottom, and the lapse of time is measured electronically. The information thus obtained is displayed on a dial on the bridge which continuously and precisely shows the depth of the water either in feet or in fathoms. The dial shows a red light at zero and another light at the particular depth beneath the ship. The trouble with this fathometer was that it showed red lights all over the dial [Rep. Tr. pp. 665, 1410]: thus there was no way to tell what depth was right [Rep. Tr. p. 690]. Before the ship left Japan, Jensen, the mate, noted this condition, reported it to the master, and it was entered in the log [Rep. Tr. pp. 666-667].

Why was it that the fathometer did not work? Here are the facts:

Following the stranding, the CHICKASAW was examined by experts both for Waterman and the claim-

ants. Appellant's own expert made the following report:

> "There is no way of determining whether or not this equipment would have worked correctly at any particular time in the past. There was ample evidence that its operation could be highly erratic and unstable for both mechanical and electronic reasons. There was also ample evidence to lead one to conclude that it had not been serviced for a long time. It was definitely in need of service at the time of this inspection for both mechanical and electronic reasons." [Rep. Tr. p. 1345].

Because it deteriorates with time, a fathometer needs preventative maintenance and should be inspected annually [Rep. Tr. p. 693]. Such an inspection would have revealed the defects which caused the malfunction of the CHICKASAW's fathometer [Rep. Tr. p. 693], a malfunction due to deterioration over a period of years [Rep. Tr. p. 705]. The last record of any work on the CHICKASAW's fathometer was *five years* before the stranding [Pet. Ex. 120, p. 35]. This was corroborated by the second mate who had served on board for five years and who testified that nothing had ever been done to it for five years [Rep. Tr. p. 390]. It had been so long since anyone had looked at the receiver amplifier (the electronic essential part of it) that the housing cover had to be pried off before it could be inspected by appellee's expert—it had been painted over with three separate coats of paint [Rep. Tr. p. 686].

How did this state of decay come to exist? What of these "inspections", "surveys", and "examinations",

which Waterman describes in their statement of the case. The short answer is that none of these "inspections", "surveys", and "examinations" concerned the fathometer. Neither the Coast Guard [Rep. Tr. pp. 1315-1316] nor the Federal Communications Commission nor the American Bureau of Ships looked at it. That is not to criticize these agencies: such inspections are not their responsibility. But, as we will see below, such inspections *are* the owner's responsibility. And the owners made no inspections.

Murdock. Waterman's Port Captain for Mobile, testified:

> "Q. Does the company have again any regular program for causing the fathometer to be opened and inspected, checked, have anything done to it? A. We do not have a regular program of that type." [Pet. Ex. 120, pp. 35-36].

On the basis of this evidence, the court found that:

> "The S.S. CHICKASAW was unseaworthy at the commencement of the voyage from each port in the Far East to the United States in that the fathometer was not in a reliable working condition." [Clk. Tr. p. 846].

It further found that:

> "Although there was some showing that the fathometer was operating properly immediately after the stranding, the mechanical and electronic condition of the fathometer was such that it could not be expected to operate consistently; that it was corroded, its electrical connections loosened and that it was generally in bad repair." [Clk. Tr. p. 847].

And the court found that:

> "Due diligence was not exercised to make the S.S. CHICKASAW seaworthy and that the loss of the vessel, the absence of due diligence, the unseaworthiness of the fathometer occurred with the privity, fault and knowledge of the Waterman Steamship Corporation." [Clk. Tr. p. 848].

The trial court found that the inoperative fathometer was the cause of the stranding. Jensen, the third mate on watch prior to the stranding, had noted, before this voyage commenced, that the fathometer was not operating and an entry to that effect was made in the log [Rep. Tr. pp. 666-667]. Jensen was on watch just prior to the stranding, looking anxiously through the night for breakers [Rep. Tr. p. 1407]. He testified that he did not use the fathometer, because he knew it did not work [Rep. Tr. p. 665]. All of the experts agreed that its use would have averted the stranding [Rep. Tr. pp. 528-529, 802].

Second: The useless R.D.F. The second major navigational aid which was unavailable was the radio direction finder. A radio direction finder is a special type of radio with a directional antenna. The antenna can be rotated toward a signal. The navigator listens to the signal in headphones. When the antenna is positioned perpendicular to the direction of the signal, there is a "null", or silent spot in the center. He can then read the bearing of the signal, in degrees, on the instrument.

As a ship approaches a coast, with the aid of this device, she can obtain the bearing of signals from radio beacons along the shore. The locations of those bea-

cons are printed on the ship's charts. If the ship has bearing from two of those stations, at different angles, those angles intersect on the chart, and the ship has a position.

The dial of such instrument does not read correctly at all angles: each bearing has what is called an "error". Use of such a device requires knowledge of the error of the particular instrument on the particular ship, at each bearing [Rep. Tr. p. 793]. The error varies with the ships heading and changes from time to time [Rep. Tr. p. 794]. Therefore, under regulations in effect in 1965 that the calibration particulars for the radio direction finder had to be checked *annually,* and that a record be kept on board of its error [47 C.F.R. § 8.517]. This is accomplished by swinging the ship in a circle, in sight of a radio direction finder beacon which corresponds with a visual beacon [Rep. Tr. p. 795]. The actual bearings, visually determined, are compared with the bearings obtained by the RDF, and a table of corrections is thus established.

This stranding took place in February of 1962. There was a chart of errors posted. The chart was *five years old* [Rep. Tr. pp. 346-347]. No one on board the ship, neither the master, nor any of the mates, knew whether the chart was usable: whether it represented errors which still existed, or errors which had been corrected by modification of the machine [Rep. Tr. pp. 242, 348]. Indeed, no one knew what if any correction to use in taking readings from the RDF [Rep. Tr. p. 243].

Readings actually obtained, as the vessel approached the shore, were wildly erratic: so wildly erratic that the master did not rely on them [Rep. Tr. p. 100]. The

court found that the pattern of variation was greater than could be accounted for by radio direction finder error, and must have resulted from negligence in taking the bearings [Clk. Tr. p. 849].

Our expert [Rep. Tr. p. 793] and Waterman's [Rep. Tr. p. 539] agree that in view of the fact that the error of the RDF was unknown, the RDF *could not be used for accurate navigation.* The CHICKASAW was effectively without a radio direction finder. It is not surprising that the crew was careless in the use of a useless instrument.

Third: The absent sounding machine. The third aid to navigation was a deep sea sounding machine. The deep sea sounding machine consists of a winch located on the forward part of the vessel, equipped with a very long and very fine steel wire. It is used to drop a supply of special bottles. The bottles contain material which changes color as the depth increases. After the bottle is retrieved it is compared with a chart which gives the depth for the color shown [Rep. Tr. p. 803].

This, like the fathometer, is a device for determining how much water there is beneath the ship, surely a useful machine to avoid stranding. Coast Guard regulations require that vessels be equipped with either a fathometer or a deep sea sounding machine [46 C.F.R. § 96.27-1]. Needless to say, an inoperative machine does not comply with the regulations.

The deep sea sounding machine is not frequently used on ships today because its use requires the ship to slow down [Cl. Ex. A, p. 210]: it is less convenient than the fathometer. Thus, it was not practical to use it at the ship's 16.5 knot speed.

> "[T]he sounding machine, even had it been attached and in good working order, was not the type of device ordinarily used, nor was it practical to use it under the conditions existing immediately prior to the grounding." [Clk. Tr. p. 850].

But, with the fathometer gone, had the sounding machine been available, its value should have been great, for surely the ship could have slowed down.

The deep sea sounding machine was lost in the following way: the mate told the Bos'n to sell it for scrap when the vessel was in Japan, before the start of this voyage [Rep. Tr. p. 748]. The reasons given for selling it are (1) it required "a lot of extra upkeep" [Rep. Tr. p. 744], and (2) that it was "rusty and no good" [Rep. Tr. p. 723].

Fourth: The disabled radar. The radar broke down on the outbound voyage between San Francisco and Japan [Rep. Tr. p. 216]. The trouble was that a number of teeth had broken off the pinion gear which rotated the antenna [Rep. Tr. p. 694].

The master of the CHICKASAW, Captain Patronas, did not have a radar endorsement on his license and knew nothing whatsoever about radar [Rep. Tr. pp. 197-198]. He made an attempt to get it repaired in Japan [Rep. Tr. p. 219], and was advised in Tokyo that no gear was available [Rep. Tr. p. 220]. He did not attempt to get a comparable gear in subsequent ports [Rep. Tr. p. 222], although one could have been machined during the thirty-five days the ship was in the Far East [Rep. Tr. p. 1060]: nor was any attempt made to have one flown out from the United States [Rep. Tr. p. 223], although this could have been done [Rep.

Tr. p. 1063]. His view was that since radar is not required by the regulations, the repair was unnecessary [Rep. Tr. p. 222]. The court found that this was not an unreasonable decision [Clk. Tr. p. 849].

Fifth: The compass and the course recorder. Neither the compass nor the course recorder is likely to have directly caused the stranding. But their condition, again, is a relevant background fact, which the trial court was entitled to consider in reaching the conclusion that unseaworthiness existed with the privity of the owners.

The ship was equipped with both magnetic and gyro compasses. Compasses require periodic correction. There was no correction card on board for one of the magnetic compasses [Rep. Tr. p. 374] and the correction card for the remaining compass was something over ten years old [Rep. Tr. p. 372]. The ship was equipped with a course recorder: a device which is useful in determining whether the vessel is making the course which her navigators intend. The course recorder did not work because the right paper rolls had never been supplied [Rep. Tr. pp. 366-367]. The record shows everywhere a total absence of any but the bare maintenance actually compelled by the Coast Guard.

Sixth: The facts as regards delegation of authority to the master. We have already seen that the court found that the fathometer was unfit—corroded, with loose connections—all with Waterman's privity. In addition. as an alternative, the court found that, after Jensen, the mate, discovered the deficiency *"Even if . . ."* the fathometer was sound, the ship was unseaworthy, because it departed from port without finding out whether the fathometer would work [Clk. Tr. p. 847]. This is unseaworthiness for the practical reason

that a crew cannot rely on a device which they reasonably believe to be unsound. The court found (the detail will be set forth below in section IV) that Captain Patronas, the master, failed to exercise due diligence in leaving port without resolving this uncertainty [Clk. Tr. p. 847]. And in the first paragraph of Finding 6, the court found that all authority with respect to repairs was delegated to the master; hence that Waterman is charged with his specific knowledge of the fathometer's condition.

In argument to this finding, Waterman proceeds as if Patronas was an ordinary master, exercising ordinary authority, under ordinary supervision. Again, that is not so. The background of evidence against which this finding was made is as follows:

Appellant's general agent for the Orient was Everett Steamship Company [Rep. Tr. p. 1170]. Everett is itself a ship operator. Everett had authority to fix the schedules for appellant's vessels [Rep. Tr. p. 1111]: to tell them where to go and when to go, where to stop, what cargo to pick up [Rep. Tr. p. 1110]—to direct their every movement. Everett had offices in all of the Far East ports where appellant stopped. In Tokyo, Max Nelson, Everett's operations manager, had responsibility for appellant that ". . . pretty well covers the whole gamut of ship operations." [Rep. Tr. p. 1109].

But in the field of repairs, "they . . . [did] not have any authority to initiate any repairs." [Rep. Tr. p. 1171]. There was no program of checks by any supervisory personnel to verify seaworthiness at any foreign port [Rep. Tr. pp. 1173-1174]. The master was the only person with authority to initiate repairs [Rep. Tr. p. 1177].

This is in fact the same rule as that applied when the ship was in U.S. ports. At no point, anywhere in the world, did appellant have any program for determining whether their ships were seaworthy as respects navigational instruments. At all times and places, the policy was the same. The matter was left entirely in the hands of the master. There was no practice of preventive maintenance: no practice of inspection: no reports were required of the master and no questions asked. This contrasts radically with the engineering department, which required detailed reports about everything [Rep. Tr. p. 1383].

The chief witness on this subject was Captain Murdock, appellant's Mobile Port Captain. Murdock had described inspection trips in which he checked "the paint condition . . .", "whether it is kept clean," "whether it is good housekeeping" [Rep. Tr. p. 1360]. But as to the navigational equipment, his testimony was:

> "Ordinarily—it is not a routine thing that I check navigational equipment, but I occasionally do check it." [Rep. Tr. p. 1360].

The *only* basis upon which a repair is made to any navigational equipment is "the request of the master, or the recommendation of the Coast Guard, or any of the regulatory bodies." [Rep. Tr. p. 1372]. Apart from carrying out any recommendations the master might make, the company had no program of its own for finding out if any deck equipment needed repairs [Rep. Tr. p. 1372].

Thus, Murdock admittedly had never, prior to the casualty, inquired of the mates concerning the fathometer's operation [Rep. Tr. pp. 1389-1390]. And com-

parably there was no program for seeing that an accurate table of corrections for the RDF was made or of inspection to see if one was on board [Rep. Tr. p. 1378]. And while the deck logs were sent into Mobile, no one read them [Rep. Tr. p. 1383]. And while the mate is required to send in a report to Murdock listing the work he has done during the voyage, no reference is made in these reports to "the operation of the radar or the gyro compass or the fathometer or the radio direction finder." [Rep. Tr. p. 1384].

Since appellant's home office took no responsibility for repairs, and no responsibility for the condition of the navigational equipment of the ship, they had (with one exception, to which we will come) no communications with her officers about this equipment.

Patronas, her master, testified:

> "Q. At the time you left the WARRIOR [Patronas' prior ship; he had just joined the CHICKASAW], did the owners request you to give them any kind of a report on the performance or [sic] navigation equipment during the previous voyage? A. No.
>
> Q. Did the owners ever, during your years aboard any Waterman vessel, ask you for any reports at the end of a voyage concerning the performance of her navigation equipment? A. I don't remember.
>
> Q. Have the owners ever asked you before a vessel of which you were master went into annual survey, have they ever asked you for any reports concerning her navigtaion equipment? A. No, sir." [Rep. Tr. pp. 283-284].

In consequence, the master did not even know what the arrangements were for the repair of the radar. We quote:

> "Q. Did they ever tell you what arrangements they had for repair of the radar? A. No." [Rep. Tr. p. 232].

Now Anthony, operations manager of appellant, claimed that it was a matter of routine to ask the master and mates if the navigation equipment was operating satisfactorily [Rep. Tr. pp. 1155-1156], even though he could not recall ever having such a conversation with Patronas [Rep. Tr. pp. 1207-1208]. So, as to this, the testimony of Filippone is of particular interest. Filippone had served as both chief mate and second mate on the CHICKASAW during his five years on board (the last trip was Patronas' first). He testified as follows (we set it forth at length because it conveys, more clearly than argument, the total lack of communication between Waterman and its officers):

> "Q. Have you ever at any time since you joined the CHICKASAW as a deck officer in any capacity had any discussion with Captain Murdock regarding your duties aboard the CHICKASAW? A. None whatsoever.
>
> Q. Have you ever had any discussion with him about maintenance of the navigation equipment? A. No, sir.
>
> Q. Has he ever given you any instructions or orders regarding the maintenance of the navigation equipment? A. None whatsoever.
>
> Q. Has any other representative of Waterman Steamship Company other than Captain Murdock ever since you have been a deck officer aboard her

had any discussion with you concerning the navigation equipment aboard the CHICKASAW? A. No, sir.

Q. Has any person from Waterman Steamship Company ever since you have been a deck officer on board the CHICKASAW had any discussion with you about the procedure to be followed in maintaining the navigation equipment aboard the CHICKASAW? A. None whatsoever.

Q. Was there any discussion about the procedure to be followed in maintaining any of the equipment aboard the CHICKASAW? A. None.

Q. Was there any discussion about how the equipment aboard the CHICKASAW of any kind had performed during previous voyages? A. No, sir.

Q. There were no discussions in that general area at all? A. Nothing whatsoever.

Q. Since you have been working for Waterman Steamship Company as a deck officer? A. No.

Q. What about working for Waterman Steamship Company as a deck officer on other ships, was there any discussion whatsoever with Waterman representatives at any time regarding your duties? A. Not to the best of my knowledge.

Q. Was there any discussion at any time with regard to the navigation equipment of any of the ships on which you had served? A. None.

Q. What spare parts were aboard the CHICKASAW when she left Mobile? A. I couldn't tell you. I don't know.

Q. What spare parts were aboard for the radio direction finder? A. I couldn't tell you. I don't know.

Q. Were you ever told by anyone what spare parts were aboard for the radar? A. No.

Q. Were you ever told by anyone what spare parts were aboard for the radio direction finder? A. No, sir.

Q. What spare parts were aboard for the fathometer? A. I don't know." [Rep. Tr. pp. 387-389].

This pattern of operation finds its most remarkable exemplification in the sale of the sounding machine. The machine was too much trouble to maintain [Rep. Tr. p. 744] so the mate told the bos'n to take it off and sell it. And to the question whether he needed authority he said:

"Q. Did you discuss it with any representative from Waterman? A. No, sir.

Q. Did you have any orders from Waterman to get rid of it? A. No, sir.

Q. Did you ask their permission whether you could get rid of it or not? A. No, sir.

Q. In the way Waterman operated these ships was it necessary for you to ask their permission? A. No, sir." [Rep. Tr. p. 749].

Anthony (Watersman's vice president in charge of operations) said that the sale was never authorized [Rep. Tr. pp. 1171-1172]. *But neither he nor anyone else denied English's testimony that no authorization was needed.* And English continued to sail for appellant after the CHICKASAW was lost [Rep. Tr. p. 1222]: no one considered the sale of the sounding machine an offense.

Patronas, then, the master, had authority in this area equal to any Vice President. Uninstructed, unadvised, and undirected, it was up to him to decide whether or not the CHICKASAW would be seaworthy. He could even sell the very equipment of the ship off the deck. And the consequence was that the fathometer did *not* get annual inspections—or any inspection at all—instead it got three coats of paint.

But we have exaggerated. It is not quite true that Patronas had *no* instructions. Appellant did have a book of instructions to masters [Jt. Ex. 51]. The text, however, antedated the fathometer, radar, the RDF, the sounding machine and the gyro compass, and said nothing about them. The only current instructions were the following:

> "SUBSIDY—NO FOREIGN REPAIRS
>
> "Effective upon receipt of this letter you will no longer use foreign labor for maintenance and repair work on our vessels, except in those cases where the repairs are necessary for the vessel to (1) proceed on her voyage with safety (2) continue to work cargo with customary efficiency.
>
> "To further analyze this—repairs to radar, radio, gyro compass, the cleaning of cargo holds, removal of grain fittings and emergency (and necessary) repairs to machinery are acceptable.
>
> "It is prohibited to use foreign labor for scaling, painting or any other work except in emergency as listed above.
>
> "Lest there be a misundertanding on anyone's part, *this is a law under subsidy, and a direct or-*

der from this Company and it must be obeyed to the letter. NO REPAIRS EXCEPT REAL EMERGENCY.

* * *

"WATERMAN STEAMSHIP
CORPORATION

/s/ F. L. Murdock
F. L. Murdock,
Port Captain" [Jt. Ex. 92].

It is worth noting that while those instructions *permit* (but do not require) repair of radio, radar and gyro compass, they do not even *permit* repair of the fathometer except for "Real Emergency."

Let us correct our statement then: Uninstructed, inadvised and indirected—*except that there were to be no repairs in foreign ports*—it was up to Patronas to decide whether or not the CHICKASAW was to be seaworthy. Is it the law that by washing its hands and doing nothing a shipowner gets immunity? That is appellant's argument. We pass to that argument.

ARGUMENT.

I.

The Deposition of John E. Jensen Was Properly Received in Evidence.

Appellant's first argument is that the court erred in admitting the deposition of Third Mate, John E. Jensen. Jensen was the mate who testified that he did not use the fathometer on the fatal night because it was not working.

The argument is that since death cut off the opportunity to cross-examine, the testimony taken should not be received. But appellant cannot urge receipt of this evidence as error. Appellant's principal witness was an expert, Captain Slack. Slack expressed the opinion that the cause of the stranding was negligence, not unseaworthiness. Slack's testimony was admittedly based in part on abstracts of depositions, *including Jensen's deposition,* furnished by counsel [Rep. Tr. p. 526].

Having placed in evidence testimony based on an abstract of Jensen's deposition, appellant cannot object to receipt of the deposition itself.

> "It is a well established law that where one party opens a field of inquiry that is not competent or relevant to the issues in the case, he will not be heard to complain that his adversary was allowed to avail himself of this opening and introduce additional evidence pertinent to that field of inquiry even though under other circumstances the testimony would be inadmissible." [*United States v. Regents of New Mexico School of Mines,* 185 F. 2d 389, 391 (10 Cir. 1950)].
>
> "As here the accused by his voluntary act, placed in evidence the testimony [depositions] disclosed

> by the record in question, and thereby sought to obtain an advantage from it, he has waived his right of confrontation as to that testimony, and cannot complain of its consideration." [*Diaz v. United States,* 223 U.S. 442, 32 S. Ct. 250, 253 (1912)]. Wigmore on Evidence (2nd Ed. 1940) § 15, pp. 304-309.

Beyond this, there was no error, even had there been no consent.

Jensen's deposition was taken for less than one day when he complained of feeling ill. By mutual consent of the parties, completion of the deposition was continued until Jensen's condition improved [Rep. Tr. p. 673]. Very shortly thereafter, it was ascertained that Jensen had suffered a heart attack [Rep. Tr. p. 674]. Later, when appellees sought to resume his deposition, it was learned that Jensen had died [Rep. Tr. p. 674]. The cases consistently uphold the admission of depositions on these facts.

As good a case as any is that cited by appellant: *Inland Bonding Co. v. Mainland National Bank of Pleasantville,* 3 F.R.D. 438 (D.C.N.J. 1944). In that case, the court held that where the deponent had died before cross-examination, and lack of opportunity to cross-examine was the fault of neither party, the partial deposition *could* be received into evidence. Exactly the same conclusion has been reached by every Federal court that has had occasion to consider this problem.[1]

---

[1]Although not necessarily apposite, every case cited by appellant except *Rutherford v. Geddes,* 4 Wall. 220, 18 L. Ed. 343 (1867) admitted the deposition testimony sought to be suppressed. In the *Rutherford* case, defendants' motion to suppress was granted because the deposition was taken without notice, in another action to which defendants were not parties, and because no showing was made that the witness could not personally appear.

The law was established by Mr. Justice Story in the case of *Gass v. Stinson,* 10 F. Cas. 72 (CC Mass. 1837). In that case, the plaintiff had a commissioner take the answers of a witness to written interrogatories. Before the filing of any cross-examination, the witness died. In upholding the admission of the dead witness's direct testimony, Justice Story stated:

> "In Arundel v. Arundel, 1 Ch.R. 90, the very case occurred. A witness was examined for the plaintiff and was to be cross-examined for the defendant; but before he could be cross-examined he died. Yet the court ordered his deposition to stand." [10 F. Cas. at 75].

Some forty years later, the court in *In Re Cary,* 9 Fed. 754, 756 (S.D.N.Y. 1881) said:

> "[T]he loss of opportunity to cross-examine the witness, by his death or other inevitable accident is not sufficient to exclude the deposition and it may be received for what it is worth."

Then followed the decision in *Inland Bonding Co., supra,* and *Inland Bonding* was followed by *Rosenthal v. People's Cab Co.,* 26 F.R.D. 116 (W.D. Pa. 1960), and *Derewecki v. Penn RR,* 353 F. 2d 436 (3rd Cir. 1965). To the same effect are Wigmore, *Evidence,* § 1390, at 110-111; McCormick, *Hornbrook on Evidence,* § 19, at 41-42; 3 Jones, *Evidence,* 717, at 1347.

Appellant relies on § 19 of McCormick's *Hornbrook on Evidence* (App. Op. Br. pp. 13-14). But Section 19 says:

> "In the case of death there seems no adequate reason for excluding the direct testimony. It has been suggested that exclusion of the direct should

> be discretionary but no matter how valuable cross-examination may be, common sense tells us that the half-loaf of direct testimony is better than no bread at all. This was the accepted practice in equity. It is submitted that the judge should let the direct testimony stand but should be required on request to instruct the jury in weighing its value to consider the lack of opportunity to cross-examine." [§ 19 at 41-42].

[To the same effect, McCormick's article, *The Scope and Art of Cross-Examination,* 47 Northwestern L. Rev. 177, 197 (1952)].

There remains a further difficulty with appellant's argument. Appellant can show no prejudice. On the critical question of why the fathometer was not used prior to the grounding, Jensen's Coast Guard testimony, which was admitted without objection [Rep. Tr. pp. 680-681], and his deposition testimony are identical: The pertinent portion of his deposition is as follows:

> "Q. You did not use it [the fathometer] at any time, I gather, because based on what you saw, it was out of order and useless? A. Yes. I didn't use it personally after that." [Cl. Ex. H, p. 43].

Jensen's Coast Guard testimony is:

> "Q. What was the main reason for not using the fathometer? A. *Well, it was out of order, in my opinion.*
>
> Q. *It was out of order, in your opinion?* A. *Yes, sir.*" [Cl. Ex. I, p. 251]. (Emphasis added).

To say that "the unmistakable conclusion from the complete Coast Guard transcript is that Mr. Jensen was

far too busy on the wing of the bridge looking for 'discolored water'" to use the fathometer (App. Op. Br. p. 17) ignores the witness's testimony and is patent nonsense. What rational man, at 7 p.m. in February, would peer through the rainy night, trying to guess the depth of the water from the color (!!), if he had a workable machine that would give him an accurate reading in a warm cabin, with no more effort than looking at one's watch?

Finally, it should be noted in passing that this cause was tried to the court. It must be presumed that in making its finding that the court had fully in mind the difference in weight between the Coast Guard testimony, as to which there was cross-examination, and the deposition, where there was not.

> *MacDonnell v. Capital Co.,* 130 F. 2d 311, 318 (9th Cir. 1942), cert. denied 317 U.S. 692, 63 S. Ct. 324 (1942).

II.

Appellant Was Properly Denied Exoneration for Cargo Damage to Cargo Loaded Prior to and After December 25, 1961 Because of the Unseaworthiness of the Fathometer.

Appellant's second argument is that there is no liability for any damage to cargo loaded prior to December 25, 1961. That argument is vital because its premise underlies appellant's whole claim that there should be limitation of liability. The argument is that:

> ". . . . It is clear, however, from the court's remaining findings, and in particular, Finding Four

[R. 846], Finding Five [R. 847], and Finding Eleven [R. 850], that but for Captain Patronas' negligence in failing to repair or check the fathometer after notification of uncertainty as to its condition on December 25, 1961 (after departure from Kobe, Japan), exoneration would have been granted under the provisions of 46 U.S.C. § 1340-(2) relating to negligent navigation." (App. Op. Br. p. 20).

The same argument is made at page 46 of appellant's brief, where, in summarizing the argument that limitation should be allowed, appellant says:

"In all of the lower court's Findings of Fact and Conclusions of Law in this action, only one negligent act is found. That act was the failure of Captain Patronas to exercise due diligence to make the fathometer seaworthy when, with knowledge of uncertainty with respect to its condition, he took no steps to repair or check it [Finding of Fact (5) R. 847]. Thus, limitation of liability could properly be denied only if Captain Patronas' negligence under the law is imputed to Appellant." (App. Op. Br. p. 46).

But none of this is so: *Captain Patronas' negligence is not the only fault found.* The court found in the first sentence of Finding 3 that:

"The S.S. CHICKASAW was unseaworthy at the commencement of the voyage from each port in the Far East to the United States in that the fathometer was not in a reliable working condition. The fathometer is an electronic device which measures and reports the depth of water beneath the vessel." [Clk. Tr. p. 4] (Emphasis added).

The reason why the fathometer was in an unreliable condition was found as follows:

> "Although there was some showing that the fathometer was operating properly immediately after the stranding, *the mechanical and electronic condition of the fathometer was such that it could not be expected to operate consistently; that it was corroded, its electrical connections loosened and that it was generally in bad repair.*" [Find. Four, Clk. Tr. p. 846] (Emphasis added).

We have already detailed the evidence supporting that finding. It is not and cannot be challenged—indeed it is the testimony of appellant's own expert.

This is the unseaworthiness of the fathometer. And the court found in express and comprehensive terms in the second paragraph of Finding 6 that:

> "Due diligence was not exercised to make the S.S. CHICKASAW seaworthy and that the loss of the vessel, the absence of due diligence, *the unseaworthiness of the fathometer occurred with the privity, fault and knowledge of the Waterman Steamship Corporation.*" [Clk. Tr. p. 848] (Emphasis added).

Note again the words: "*the unseaworthiness of the fathometer . . .*" occurred with Waterman's privity. The "unseaworthiness of the fathometer" is the rusty, corroded, loosened condition of the machine.

To repeat briefly the evidence, a fathometer, should be inspected annually [Rep. Tr. p. 693]. But nobody touched the CHICKASAW's fathometer during the five years before the stranding except to give it three coats of paint [Rep. Tr. p. 686]. How can it be con-

tended, then, that either this condition, or the lack of due diligence, dated from December 25, 1961? And how can it be contended that this is a fault ascribable solely to Captain Patronas? For it represents at least five years of neglect and Patronas joined the ship on November 3, 1961 [Rep. Tr. p. 55], a bare three months before she was lost.

Now the court *also* found that:

> "*Even if* the deficiency of the fathometer had been temporary only and even if the fathometer would have worked if it had been used, to leave port without checking it or repairing it was to leave port with the vessel in an unseaworthy condition for the reason that Jensen in his then state of knowledge as respects the fathometer, could not have been expected to use or rely upon it." [Clk. Tr. p. 847] (Emphasis added).

But when the court said "even if . . .", it did not cancel its express finding that the fathometer was *not* seaworthy. Rather, as we will see, it stated an alternative ground for decision: equally compelling.

We will see below that, with respect to the "Even if" finding, the court found that Patronas failed to exercise due diligence in that he took no step to remove this "uncertainty" [Clk. Tr. p. 847]. And similarly the court found (as we will later see in detail) that Waterman had delegated managerial authority to Patronas, so that this want of due diligence was Waterman's. All this will be discussed below, in part IV of this brief. But we take up first the effect of the findings that the fathometer *was* unseaworthy.

What is the effect of the unseaworthiness of the fathometer? Above all else, this record makes one thing abundantly clear—appellant did not have any system of inspection of the fathometer (or anything else). This fact is confirmed both by the ship's personnel and appellant's shoreside employees, and is alone sufficient to sustain the court's finding of lack of due diligence.

Ionion Steamship Co. of Athens v. United Distillers, 236 F. 2d 78 (5th Cir. 1956);

Ore Steamship Corporation v. D/SA/S HASSEL, 137 F. 2d 326 (2nd Cir. 1943);

Standard Oil Company v. Anglo-Mexican Petroleum Corporation, 112 F. Supp. 630, 637 (S.D.N.Y. 1953).

In the *Ionion* case, the court correlated due diligence and the duty to inspect as follows:

> "[W]here the standard of due diligence is applicable, it comprehends inspection and investigation, where prudent, to determine the existence of deficiencies *before they become critical,* and the failure to discover defects which examination would necessarily have disclosed is the very absence of due diligence." [236 F. 2d at 84] (Emphasis added).

How can a duty to inspect and discover defects "before they become critical" be reconciled with appellant's theory that responsibility arises from the moment of total failure only?

The condition of the fathometer: this total want of inspection, attention, or anything else, precludes exoneration. There is no "due diligence" shown on this record. What of limitation of lability?

III.

Failure to Take Steps to Provide Seaworthy Equipment Precludes Limitation.

We have in this case, on the facts, a total failure on the part of the owner to do *anything* to make the ship safe. The condition of the fathometer is traceable to a total lack of inspection and maintenance for at least five years. Analogously, the correction table for the radio direction finder was five years old and worthless. So casual was supervision that although the mate sold the very equipment off the deck of this ship, before this voyage started, without express authorization from his superiors, he continued to sail without criticism, comment or complaint as chief mate for appellant. His testimony—that he needed no authorization—appears to state the situation accurately. The rolls were wrong for the course recorder—the fathometer corroded—the compass uncorrected—the whole situation smells of indifference.

Now as we understand appellant's argument, it believes that these facts require limitation as a matter of law. Because the president, vice president, directors and port captains were careful to have nothing to do with the maintenance of this equipment, they are relieved of liability—everything was left to the skipper and they are not liable for what the skipper does. This is the theory. It is hard to imagine an approach which would place a higher premium on managerial indifference. Is this all there is to the law? Not by quite a bit.

The shipowner's obligation is to exercise "control" —to provide a sound ship. Absent effective control, a shipowner will be denied limitation. This is contrasted

to "instantaneous negligence" of the crew, for which the owner is not responsible. This fundamental difference has been clearly spelled out by this court.

In the second rehearing of the *Pennsylvania (States Steamship Company) v. The United States,* 259 F. 2d 458, 474 (9th Cir. 1958), cert. denied 358 U.S. 933, 79 S. Ct. 316 (1959), rehearing denied 359 U.S. 921, 79 S. Ct. 579 (1959), the court there set forth, quoting Gilmore and Black, *The Law of Admiralty,* 2d Ed. 1957, that:

> " 'The principle of the Limitation Act is the same as that found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a nominal control over his "servants" once the ship has broken ground for the voyage, the owner should be entitled to exoneration from liability, or at least to a limitation of liability, for whatever happens after the ship has passed beyond his effective control. *Contrariwise, he should be held to liability for all loss resulting from his failure to exercise effective control when he had the chance.*[6] Although the Limitation Act uses a vocabulary different from that of Harter and Cogsa, the concept of liability is the same: the shipowner is not chargeable with "privity or knowledge" or with "design or neglect" when he has used "due diligence" to furnish a seaworthy ship; he is so chargeable when he has failed in his duty of "due diligence" and has sent out a ship unseaworthy in some respect that proximately contributes to the loss.'[7]"

And in Note 6, the court quoted *The Cleveco,* 154 F. 2d 605, 613 (6th Cir. 1946):

> "('* * * knowledge means not only personal cognizance but also the means of knowledge—or which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it.'), and in Great Atlantic & Pacific Tea Co. v. Brasilerio, 2 Cir., 159 F.2d 661, 665 ('*The measure in such cases is not what the owner knows, but what he is charged with finding out.*')" (Emphasis added).

There is an infinity of authority to the same effect.

Thus, appellant had no system for inspecting the CHICKASAW's navigational equipment. But a vessel owner is required to conduct proper inspections and limitation will be denied if he does not.

> *Austenberry v. United States,* 169 F. 2d 583 (6th Cir. 1948);
>
> *Calvert,* 51 F. 2d 494 (4th Cir. 1931);
>
> *In Re P. Sanford Ross,* 204 Fed. 248 (2nd Cir. 1913);
>
> *In Re Petition of Henry DuBois' Sons Co.,* 189 F. Supp. 400 (S.D.N.Y. 1960).

He is chargeable with knowledge of all that the proper inspection would have revealed.

> *Dexter-Carpenter Coal Co. v. New York, O. & W. Ry. Co.,* 50 F. 2d 270, 271 (S.D.N.Y. 1931).

> "[T]he owner's lack of knowledge can only mean that the owner did not inspect the vessel or provide a regular system of inspection . . . its unfitness

would have been visible to anyone on a careful inspection. Under such circumstance, proof by the owner that a carpenter in its employ went over the boats and did minor jobs on them, does not suffice to bring the case within the limitations act."

Accord:

Argent, 1940 A.M.C. 508 (S.D.N.Y. 1915).

That appellant purported to delegate the duty to inspect does not change the result.

The Miami, 43 F. 2d 562 (S.D.N.Y. 1930).

There, limitation was denied where the corporate shipowner left the matter of inspection to the captain. The court held:

"There is no proof that there was any serious system of inspection or reliance upon any really competent reason for that purpose.

"Under such circumstances not only has there been a failure of proof on the part of the petitioner, but the facts all indicate a situation that may well raise a presumption that the corporation must be presumed to have had knowledge of her condition. See *P. Sanford Ross, Inc.,* 204 Fed. 248 (2 CCA)." (43 F. 2d at 564).

Again, if responsibility is delegated, the cases establish that a shipowner must give appropriate instructions to the ship's personnel to whom the management of the vessel is entrusted.

Coleman v. Jahncke Service, Inc., 341 F. 2d 956 (5th Cir. 1965), cert. denied 382 U.S. 974, 86 S. Ct. 538 (1966);

Kulack v. The Pearl Jack, 79 F. Supp. 802 (W.D. Mich. 1948), aff'd 178 F. 2d 154 (6th Cir. 1948).

Shipowners must take an active role in the management of their vessels and avail themselves of every means of knowledge concerning conditions likely to contribute to a casualty unless appropriate action is taken.

Continental Ins. Co. v. Sabine Towing Co., 117 F. 2d 64 (5th Cir. 1941), certiorari denied, 61 S. Ct. 1111, 313 U.S. 588, 85 L. Ed. 1543;

The Clevcco, 154 F. 2d 605 (6th Cir. 1946);

Great Atlantic & Pacific Tea Co. v. Brasileiro, 159 F. 2d 661 (2nd Cir. 1947), cert. denied, 331 U.S. 836, 67 S. Ct. 1519 (1947);

Pennsylvania (States Steamship Co.) v. United States, 259 F. 2d 458 (9th Cir. 1957); rehearing 259 F. 2d 470 (9th Cir. 1958), cert. den. 358 U.S. 933, 79 S. Ct. 316 (1959);

In Re Petition of Henry Du Bois' Sons Co., 189 F. Supp. 400 (S.D.N.Y. 1960);

Petition of Sause Bros. Ocean Towing Co., 193 F. Supp. 14 (D. Oregon 1960);

Tug Carrie Mack-Barge 204, 194 F. Supp. 383, (S.D. Ala. 1961);

Ruth Conway Tug Hustler, 75 F. Supp. 574 (D. My. 1947).

One of the classic reasons for denying limitation is the failure of the vessel owner to suitably equip his vessel. This is best illustrated by Judge Learned Hand's opinion in

The T. J. Hooper, 60 F. 2d 737 (2nd Cir. 1932), cert. denied 287 U.S. 662, 53 S. Ct. 220.

There, Judge Hand, unaided by case precedent or statutory regulation, concluded that limitation was unavailable to a shipowner who failed to equip his vessel with

an operable radio. The case here is more compelling—the fathometer was required by Federal Regulation, 46 C.F.R. § 96.27-1:

> "(a) All mechanically propelled vessels in ocean or coastwise service of 500 gross tons . . . shall be fitted with either an electronic or mechanical deep sea sounding apparatus in addition to deep sea hand leads . . ."

That the CHICKASAW was not suitably equipped with required sounding equipment cannot be doubted. The deep sea sounding machine had been sold for scrap, and the fathometer had expired from old age.

The duty to provide seaworthy equipment includes a duty to maintain it.

Coleman v. Jahncke Service, Inc., 341 F. 2d 956 (5th Cir. 1965), cert. denied 382 U.S. 974, 86 S. Ct. 538 (1966);

Henson v. Fidelity & Columbia Trust Co., 68 F. 2d 144, 145 (6th Cir. 1933), rehearing denied 69 F. 2d 778 (6th Cir. 1934);

The T. J. Hooper, 60 F. 2d 737 (2nd Cir. 1932);

Compania General De Tobacas De Filipinas v. United States, 49 F. 2d 700 (2nd Cir. 1931);

Gunnarson v. Robert Jacob, Inc., 94 F. 2d 170 (2nd Cir. 1938), cert. denied 303 U.S. 660, 58 S. Ct. 764, rehearing denied 304 U.S. 588, 58 S. Ct. 945 (1938);

Kulack v. The Pearl Jack, 79 F. Supp. 802 (W. D. Mich. 1958); aff'd 178 F. 2d 154 (6th Cir. 1948);

The Pegeen, 14 F. Supp. 748 (S.D. Calif. 1935).

If the rule were otherwise, a shipowner could, as appellant claims, turn every phase of the ship's operation over to the master and blame any casualty on poor seamanship. The simple answer to this is that:

> "[T]he navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transfer unseaworthiness into bad seamanship." *The Maria,* 91 F. 2d 819, 824 (4th Cir. 1937).

To sum up here: the condition of the fathometer, as found by the court, coupled with a practice of no inspection for years, establish want of due diligence and privity, as found by the court. It will be found that the judgment is equally sustained by the "even if" findings.

IV.

The "Even if" Finding: Waterman's Responsibility for the Master.

In addition to finding that the fathometer was *actually* unseaworthy, the court stated an alternative ground both of liability and for denial of limitation. It found that:

> "Even if the deficiency of the fathometer had been temporary only and even if the fathometer would have worked if it had been used, to leave port without checking it or repairing it was to leave port with the vessel in an unseaworthy condition for the reason that Jensen in his then state of knowledge as respects the fathometer, could not have been expected to use or rely upon it." [Find. 4, Clk. Tr. p. 846].

The court then went forward and found that Patronas failed to exercise due diligence in that he did not clear up this situation. Finding 5 [Clk. Tr. p. 847] says:

> "Captain Patronas failed to exercise due diligence to make the fathometer seaworthy because, with knowledge of the uncertainty with respect to its condition, he took no steps to repair or check it."

Finally, in the first paragraph of Finding 6 [Clk. Tr. p. 847] this is tied back to Waterman. The court found:

> "It was the Waterman Steamship Corporation's obligation to exercise due diligence to make the S.S. CHICKASAW seaworthy at the commencement of the voyage from the Far East. This included an obligation that the ship's navigational equipment be put in a suitable state of repair before going to sea. Waterman Steamship Corporation operated a regularly scheduled service, carrying cargo from all the Far East ports for regularly commenced voyages, and it had a general agent in the Far East, Everett Steamship Corporation, which performed the function of the owner only as respects scheduling cargo, arranging stevedoring, tug and other necessary services. Waterman Steamship Corporation did not give Everett authority to direct repairs. *As to repairs, Waterman placed all authority, including authority to decide whether repairs should be made at all, with the master,* and had in the Far East no supervisory or managerial personnel to carry out its obligation to exercise due diligence to make the

vessel seaworthy. *Waterman therefore had delegated to the master its entire managerial responsibility as respects such repairs at the commencement of this voyage and therefore Waterman had knowledge, privity and is at fault for the decision not to repair the fathometer.*" (Emphasis added).

It is clear (and not contested by appellant) that liability arises because when the CHICKASAW sailed, its crew believed, even if incorrectly, that the fathometer was useless. This is a classic example of what is called disabling want of knowledge.

Standard Oil Company of New York v. Clan Line Steamers, Ltd. [1924], A.C. 100, [1924] S.C. (H.L.) 1;

The Silver Palm, 94 F. 2d 776 (9th Cir. 1937), cert. denied 304 U.S. 576, 58 S. Ct. 1046 (1938);

The Union Reliance, 222 F. Supp. 874 (S.D. Tex. 1963), aff'd 364 F. 2d 769 (5th Cir. 1966), cert. denied 386 U.S. 933, 87 S. Ct. 955 (1967).

Logically, as these cases hold, if the ship's personnel lack the requisite knowledge to operate required equipment, or, as here, are permitted to believe it will not operate, the ship is every bit as unseaworthy as when the equipment is in fact inoperative.

While liability is conceded, appellant urges that these facts do not preclude limitation of liability.

It is of particular importance to note, in this connection, that Waterman does not challenge the *factual* correctness of the finding that comprehensive authority

was given the master. It is not argued that these findings are "clearly erroneous" or erroneous at all. There is therefore presented a square question of law: is the owner liable for the acts of the person to whom it has given all the authority there is in the company respecting maintenance and repairs—respecting seaworthiness in the most basic sense? To those questions, we believe, there can be only one answer: the responsibility of a shipowner for the acts of an agent (and a corporation acts only by agents) is determined by function: the actual authority of the agent. What his *title* is has nothing to do with the matter; and the owner is liable, without limitation, for the neglect of the person who is placed in charge of maintenance. Discussion of that liability requires us briefly to follow the growth of the law.

The limitation of liability act was enacted in 1851, when most ships were operated by individuals, not corporations. As applied to individuals, the term "without the privity and knowledge of such owner or owners" [46 U.S.C. Section 181] is relatively easy to apply: the distinction is between a man's own knowledge and that of his agents. (The cases indicate that an agent with general authority, even in the case of an individual, may be identified with the individual: we are not concerned with that problem here.)

In the case of a corporation, this simple rationale does not work. A corporation can only act through agents. There can be no distinction between the knowledge of a corporation and that of its agents: the two are identical. And so, in the case of a corporation, more clearly than in the case of individuals, there has had to be a distinction between agents. This is spelled

out in general terms in *Coryell v. Phipps,* 317 U.S. 406, 410, 63 S. Ct. 291, 293 (1943), as follows:

> ". . . . A corporation necessarily acts through human beings. *The privity of some of those persons must be the privity of the corporation else it could always limit its liabilty.* Hence the search in those cases to see where in the managerial hierarchy the fault lay.
>
> "In the case of individual owners it has been commonly held or declared that privity as used in the statute means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury."

The first case in the Supreme Court dealing with applicability of the act to a corporation was *Craig v. Continental Insurance Company,* 141 U.S. 638, 12 S. Ct. 97 (1891). It said that:

> "When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation." [12 S. Ct. at 99]

It was ultimately found that the offenders involved were not agents of the corporation at all, so limitation was granted.

Craig speaks of "officers" of the corporation. But it came to be realized that function, not title, is what counts. The leading early case on the point, still frequently cited, is *In P. Sanford Ross,* 204 Fed. 248 (2nd Cir. 1913). The case involved a pile driver barge which lacked an essential part. One Campbell was a "superintendent" whose job it was to see that these vessels were repaired. He knew of the missing part.

The court reversed the District Court (which had allowed limitation of liability), saying:

> "The petitioner is apparently a large corporation having different departments of business, over one of which Campbell was superintendent. It is not satisfactorily shown that any duly elected officers of the corporation had any duty of inspecting the pile driving plant under him. There is not proof that the pile driver, either as part of the structure or of the equipment, ever had a chock-block and Campbell certainly was aware of its condition. Under such circumstances we still think he was such a representative of the corporation that his knowledge was imputable to it. While the cases generally speak of the knowledge of managing officers as being the knowledge of the corporation, the real test is not as to their being officers in a strict sense but as to the largeness of their authority." [204 Fed. at 251.]

The remainder of the opinion is also strikingly pertinent. The court continued at page 251:

> "The petitioner further urges that we should now take further testimony as to the authority actually possessed by Campbell. It is possible that we should give weight to this request were it not for another consideration which we did not lay stress upon in the opinion. It is entirely clear from the testimony, as already pointed out, that this vessel which was rebuilt by the petitioner as a pile driver had been lacking in a chock-block for five years before the accident. Whatever may have been the authority of the superintendent, the corporation must be presumed to have had knowledge

of such condition, and this presumption is not overcome by general statements of the elected officers that they kept the vessel in good repair and knew of no defects in it."

Two years later *P. Sanford Ross* was followed by the decision of Judge Hough, one of the great admiralty Judges of the past, in *Argent,* 1940 A.M.C. 508 (S.D.N.Y. 1915). Tradition has it that *Argent* was finally reported in 1940 because for twenty-five years, counsel had cited it from copies of the opinion, informally circulated. In that case, a company had directed a person described simply as an "employee", one Conway, to maintain the boat. The company was charged with his knowledge and limitation denied. As in *P. Sanford Ross,* the alternative grounds were (a) that the person charged with mantenance is the "managing agent", or (b) that the owner is charged with knowing what it would have learned if it asked. Again, in *The Rambler,* 290 Fed. 791 (2nd Cir. 1923), the testimony was that the engineer charged with inspecting a certain boiler must have known of an unlawful practice of tying down the safety valve. It was held that his knowledge would charge the company. [The finding as to the practice was rejected however, and therefore the case reversed: here, however, the findings are not even contested].

In 1937, in the *Silver Palm,* 94 F. 2d 776 (9th Cir. (1937), cert. denied 304 U.S. 576, 58 S. Ct. 1046 (1938), this court had before it a case where a master had not been properly instructed as to the reversing characteristics of an engine. The claim was that responsibility had been delegated to another corporation,

hence the owners were not privy. The court rejected the claim, saying:

> "In proceedings for limitation the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise. So far as concerns privity and knowledge, such an agent is its alter ego." [94 F. 2d at 780]

In 1957 and 1958, this court decided the *Pennsylvania (States Steamship Company) v. United States,* 259 F. 2d 458 (9th Cir. 1958). In that case, privity was found on the basis of the knowledge of one Valet, on the basis of his testimony that, *"I am in charge of the maintenance and repair of all vessels."* [259 F. 2d at 465] (Emphasis added).

His knowledge sufficed. In precisely the same way, the record, in our case, is unequivocal that Patronas was "in charge of the maintenance and repair" of the navigation equipment on the CHICKASAW. If not he, there was no one.

Following *Pennsylvania,* in *Porto Rico Lighterage Co. v. Capital Construction Co.,* 287 F. 2d 507 (1st Cir. 1961), cert. den. 358 U.S. 933, 79 S. Ct. 316 (1959), the first circuit indicated that as to "seaworthiness, as to which petitioner had an affirmative duty" knowledge of the "superintendent" responsible for the repairs, would suffice. The "superintendent" in question was the mechanic who made the repairs.

Other cases denying limitation on the basis that the owner has the knowledge of whoever he puts in charge of repairs are:

Calvert, 51 F. 2d 494 (4th Cir. 1931);

Great Atlantic & Pacific Tea Co. v. Brasileiro, 159 F. 2d 661 (2nd Cir. 1947), cert. denied 67 S. Ct. 1519, 331 U.S. 836 (1947);

Petition of Converse, 1932 A.M.C. 1492 (2nd Cir. 1932);

Tug Carrie Mack-Barge 204, 194 F. Supp. 383 (S.D. Ala. 1961);

In re Petition of Henry Du Bois' Sons Co., 189 F. Supp. 400 (S.D.N.Y. 1960);

In re Jacobson, 52 F. 2d 179 (S.D. Tex. 1931);

City of Brunswick, 6 F. Supp. 597 (D.C. Mass. 1934).

And see:

Midland Victory, 178 F. 2d 234 (2nd Cir. 1949); and,

In Re Pacific Mail S.S. Co., 130 Fed. 76 (9th Cir. 1904), cert. denied 195 U.S. 632, 25 S. Ct. 790 (1904).

These authorities dispose of petitioner's third assignment of error that the trial court wrongly "assumed" that there is a "non-delegable-duty . . ." to make the vessel seaworthy. No such assumption is made in the findings. Rather, it is found that the duty to make the vessel seaworthy exists [Find. 6], and that Waterman is liable for the acts of the person to whom a comprehensive grant of authority is made: an incontestable proposition under these authorities.[2]

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[2]In *The Pennsylvania,* 259 F. 2d 458, Cert. denied 358 U.S. 933, 79 S. Ct. 316 (1959), at p. 472, in note 2, this court appears to us to have held that the duty of making the ship seaworthy "in the primitive sense" is not delegable. We adopt that

There can be no question, then, that the owner is privy to the knowledge of the person who is in charge of maintenance and repairs. What follows here? The court found "as to repairs . . ." Waterman had delegated *"all authority, including authority to decide whether repairs should be made at all" to the master.*

And the court found Waterman had delegated to the master *"its entire managerial responsibility as respects repairs."* The factual correctness of that finding is not attacked: nowhere is it assigned as error that this finding is clearly erroneous. If Patronas had been *entitled* "Port Captain", "Superintendent", or something else, on this finding, indisputedly his knowledge binds the owner. Does it make any difference that he was also master?

Precisely this point was answered in

> *Austerberry v. U.S.,* 169 F. 2d 583 (6th Cir. 1948).

In that case, the Coast Guard entrusted a bos'n's mate with the responsibility of laying up a 32 foot motorboat. The vessel carried a crew of four: the bos'n's mate was master. When she was laid up, her engine was removed, but gasoline was left in the fuel line and tank. A fire resulted. Limitation of liability was

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view: in view of the findings below, it is not necessary to go into that point here.

There was a view expressed in many of the earlier limitation cases to the effect that "appointment of a competent person" *i.e.,* a comprehensive delegation of authority, did relieve the owners. Under the cases cited in the text, that point of view had died long ago.

denied (reversing the District Court), the court saying:

> "A corporation, as does the government in this case, acts through human beings. The privity of some of those persons must be the privity of the government, else it could always limit its liability. As the Supreme Court said in a similar case involving a corporation: 'Hence the search in those cases to see where in the managerial hierarchy the fault lay.' *Coryell vs. Phipps, supra,* 317 U.S. p. 411, 1943 A.M.C. p. 22. 'While the cases generally speak of the knowledge of managing officers as being the knowledge of the corporation, the real test is not as to their being officers in a strict sense but as to *the largeness of their authority.' In Re P. Sanford Ross, Inc.,* 204 Fed. 248, 251 (2 CCA). (Emphasis added)
>
> "The burden was upon the government to prove that it had no privity or knowledge of negligence, or that there was no privity or knowledge or the means of knowledge of negligence on the part of those *to whom it had delegated the duties of commanding, maintaining, and operating the vessel. Coryell v. Phipps,* 317 U.S. 406, 1943 A.M.C. 18; *The Cleveco,* 154 F.2d 605 (6th Cir. 1946).
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> * * *
>
> "There was no evidence of any such inspection. In the light of the proofs, strong inferences of negligence can be drawn from the leaving of gasoline in the exposed tubing, after the removal of the engine. There is no evidence that anyone in charge of the vessel for the government was interested in taking any precautions in this regard." [169 F. 2d at 594].

Every word of that case fits here.

Again, in *Petition of Oskar Tiedemann and Company,* 179 F. Supp. 227, 236 (D.C. Del. 1959), aff'd., 289 F. 2d 237 (3rd Cir. 1961), the court says:

> "It is elementary in Admiralty law that if, when a ship leaves port, the owner, master, etc., knew or should have known that she was unseaworthy due to some unsafe condition, or was improperly equipped or manned, and loss of life, personal injury or property damage results therefrom, he is not entitled to limit his liability. The Cleveco, 6 Cir., 154 F.2d 605."

To the same effect is *Petition of United States,* 105 F. Supp. 353, 369 (S.D.N.Y. 1952), wherein Isbrandtsen was denied limitation of liability because of the acts of an agent in charge of loading [This portion of the District Court's opinion was approved, but liability otherwise restricted in 201 F. 2d 281 (2nd Cir. 1953), on other bases.]

Mixed with the cases stating the rule that the owner is charged with the knowledge of his servants, there are repeated references to his own duty to know. In *The Vestris,* 60 F. 2d 273 (S.D.N.Y. 1932) there was a pattern of overloading, and it was held that owners should have known. In *Argent,* 1940 AMC 508, 509 (S.D.N.Y. 1915) there was an unlawful light, the court saying:

> "If lack of actual knowledge were enough, imbecility, real or assumed, would be at a premium."

Other cases to the same effect are:

> *Great Atlantic & Pacific Tea Co. v. Brasileiro,* 159 F. 2d 661, 664 (2nd Cir. 1947), cert. denied 331 U.S. 836 (1947);

Dexter-Carpenter Coal Co. v. New York, O. & W. Ry. Co., 50 F. 2d 270, 271 (S.D.N.Y. 1931).

Which doctrine is followed hardly matters; no case for limitation is made here. All this is not to say that an owner is liable, without limitation, for every act of a master. The fault of appellant's entire argument is that they fail to distinguish between the master, acting as a seaman, and a master, to whom the owner has transferred *his* job. The line of distinction is between the two basic responsibilities of maritime transport. We are concerned with the owners job—the duty to provide a sound ship. If he gives the job of providing a safe ship to someone else, he is liable for that person's acts.

> " 'The principle of the Limitation Act is the same as that found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a nominal control over his "servants" once the ship has broken ground for the voyage, the owner should be entitled to exoneration from liability, or at least to a limitation of liability, for whatever happens after the ship has passed beyond his effective control. *Contrariwise, he should be held to liability for all loss resulting from his failure to exercise effective control when he had the chance.*' " [*The Pennsylvania (States Steamship Company) v. The United States,* 259 F. 2d 458, 474 (9th Cir. 1957), cert. denied 358 U.S. 933, 79 S. Ct. 316 (1959)].

We are *not* concerned with the seaman's job—the loading and sailing of the ship—once the owner has pro-

vided a sound ship. An error in loading cargo, or error in navigation when at sea is the sort of fault to which the limitation act is directed. That was made perfectly clear by this court in *Admiral Towing Company v. Woolen,* 290 F. 2d 641 (9th Cir. 1961), in discussing the case of an individual owner.[3] As to an individual, the court observed:

> "There will surely come a case where the unlimited agent is the master of the vessel and the causative negligence is an error in seamanship resulting from a spur of the moment decision. To impute the master's mistake to the shipowner in such a situation simply because the master has been given broad and unlimited agency powers over the operation and maintenance of the vessel, would be to rob the shipowner of just that protection which the Limitation Act was apparently designed to afford him: *immunization from instantaneous negligence on the part of the master at sea, negligent behavior over which the shipowner could not possibly exercise control.*" [290 F. 2d at 648] (Emphasis added).

The court then went on to decide the case on the familiar ground that the owner had, but did not use the "means" of knowledge. But the case defines sharply and clearly the distinction between providing a safe ship —where the owner *must* exercise *control,* and is liable for the acts of whoever he gives control to—and instantaneous negligence—for which the owner is not liable.

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[3]Privity is imputed less freely in the case of an individual owner than a corporation: a corporation always acts by agent and an agent's knowledge must be that of the owner. In the case of an individual this is not so. See Gilmore and Black, *The Law of Admiralty* (1957), p. 700: *Coryell v. Phipps,* 317 U.S. 406, 411, 63 S. Ct. 291, 293 (1943).

Because the master's function is normally that of the seaman, inevitably, there are numerous cases granting limitation for his faults. We know of no such case, however, wherein he had the authority diclosed by our record. As we have seen, the authorities are the other way.

Do any of Waterman's authorities suggest that the master does not count if he is given complete charge of all repairs: complete responsibility to decide if the ship shall or shall not be seaworthy? None of them even involve the problem—not one involves an owner who never troubled to inquire into seaworthiness: an owner who simply left the ship's condition up to the master.

Appellant places particular reliance upon the case of *Earle & Stoddard v. Ellerman's Wilson Line,* 54 F. 2d 913 (1931), affirmed 287 U.S. 420, 77 L. Ed. 403 (1932). But that is a fire statute case involving a chief engineer who negligently overstowed new coal over old, causing fire. That is a perfect example of the "instantaneous negligence" for which limitation is granted. But the case is plain that the owner would not have been granted limitation if there had been a failure to provide suitable equipment. The court said:

> ". . . [I]n the case of The Malcolm Baxter, Jr., as appears from the decision of the District Court, 55 F.(2d) 312, the vessel's hull had defects which an inspection would have disclosed, but the owner did not provide a suitable person to inspect the vessel, which it had purchased without any warranty of seaworthiness in the bill of sale. *Hence the lack of diligence was the owner's, and the loss resulting from unseaworthiness was within the owner's 'privity.'"* [54 F. 2d at 915] (Emphasis added).

Can one imagine a more perfect description of our case?

Appellant next cites *The Yungay,* 58 F. 2d 352 (S.D.N.Y. 1931) for the proposition that the negligence of the master can never be at bar to limitation. There, an individual owner testified that he instructed the master to compensate the ship's compass. The master did not. Limitation was granted—the owner had done what he could. Where are the instructions here? The only instruction proved was "*No Repairs Except Real Emergency*" [Cl. Ex. 92]—hardly an excuse.

Yungay should be considered with

> *Coleman v. Jahncke Service, Inc.,* 341 F. 2d 956 (5th Cir. 1965), cert. denied 382 U.S. 974, 86 S. Ct. 538 (1966)

where limitation was denied for lack of a property calibrated compass.

The distinction between these two cases lies in the "control" exercised, to use the term of *The Pennsylvania.* In *Yungay,* the owner instructed the master, a competent person, to do the job. In *Coleman,* the owner left it to the master to determine the compass deviation [error caused by the ship's magnetic field] when any inquiry would have revealed the master did not have ". . . the slightest understanding of the workings of a compass or how to compensate for the factors that effected its performance." [341 F. 2d at 958.]

Petition of Kinsman Transit Company, 338 F. 2d 708 (2nd Cir. 1964), is equally remote from our facts. It is another case of the "instantaneous negligence" of a seaman—the case of a master who failed to moor a vessel properly, so that ice carried it away.

And, like appellant's other authorities, *Kinsman* makes it perfectly clear that if the shipowner had failed to provide a sound ship (through whatever instrumentality) limitation would not be granted. The court said [338 F. 2d at 716]:

> "Two other points must be considered. If the Shiras was not seaworthy in what has been termed the 'primitive sense' of being 'tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped,' *a corporate owner who has failed in his duty to provide such a ship does not escape full liability. Gilmore & Black, supra,* 702." (Emphasis added).

The *ARIEL,* 33 F. Supp. 573 (S.D.N.Y. 1940), aff'd 119 F. 2d 866 (2nd Cir. 1941), cited without comment by appellant on page 39 of its brief, involved a fishing vessel that failed to return to port following a severe hurricane. The court never really got to the question of limitation, as it found that there was no evidence of unseaworthiness and granted complete exoneration. The same is true of *Hartford Accident & Indemnity Co. v. Gulf Reining Co.,* 230 F. 2d 346 (5th Cir. 1956), cert. denied 352 U.S. 49, 77 S. Ct. 419 (1956). There, the Fire Statute was first asserted as a defense on appeal. The case was remanded with directions to take evidence on the point [230 F. 2d at 356].

Few things are more ironic in this case than appellant's reliance on Judge Leonard Hand's words in

> *Moore-McCormack Lines, Inc. v. Armco Steel Corp., 272* F. 2d 873 (2nd Cir. 1959) cert. denied 362 U.S. 990, 80 S. Ct. 1079 (1960)

that "it was left to those in charge to follow these instructions . . ."—instructions which called for a specified stowage practice. *Where are instructions here? "Make No Repairs . . ."*—this will hardly do. What else is there? Beyond that, *Moore-McCormack* is another of the cases which consistently recognizes that the owner *cannot* limit where he provides defective equipment at the start of a trip. The District Court found that the steamship company had provided a defective "stabilogauge", a defective item of equipment, and denied limitation. The Appellate Court found the gauge was good and granted limitation. But the opinion leaves no doubt that had the evidence established that the gauge was bad, limitation would have been denied.

The remaining cases cited by appellant are similar. While appellant seeks refuge in the law to avoid the consequences of its complete indifference toward the CHICKASAW's navigational equipment, it has not found an ally. The law is never fooled by titles, be it vice president, superintendent, port captain, agent or master: ". . . it is the largeness of authority which counts." [*In Re Stanford Ross, supra*], "Privity like knowledge turns on the facts of particular cases." [*Coryell v. Phipps, supra*]. If on "the facts" there was a "failure to exercise effective control" [*Pennsylvania (States Steamship Company v. The United States), supra*], limitation must be denied. The findings, that there was such a failure, are not even contested.

V.

The Judgment Must Be Affirmed Because Appellant Has Not Sustained Its Burden of Proof Neither With Respect to Showing Due Diligence nor Want of Knowledge and Privity.

This is a case where the unseaworthiness of the vessel is conceded. At the least, the fathometer was in such a condition that it could not be expected to operate consistently. It was corroded, its terminals loose, and it was generally in bad repair. It had not in fact been inspected and repaired for at least five years. Its failure was attributable to inattention and indifference.

The law is clear that where unseaworthiness exists, the shipowner carries the burden of proving due diligence to avert the defective condition. 46 U.S.C.A. § 1304(1); *Ionion S.S. Co. of Athens v. United Distillers,* 236 F. 2d 78 (5th Cir. 1958).

There is no evidence of any diligence at all in this record, and therefore the burden was not carried. The evidence is all to the contrary.

Beyond that, it is equally clear that Appellant, on a petition for limitation of liability, carries the burden of proving that any unseaworthiness exists without its knowledge and privity.

Coryell v. Phipps, 317 U.S. 406, 409, 63 S. Ct. 291 (1943);

Pennsylvania (States Steamship Company) v. United States, 259 F. 2d 458, 464, 466, 474 (9th Cir. 1958), cert. denied 358 U.S. 933, 79 S. Ct. 316 (1959);

The E. Madison Hall, 140 F. 2d 589, 591 (4th Cir. 1944) cert. den., *W. E. Valiant Co. v.*

Raynoier, Inc., 322 U.S. 748, 64 S. Ct. 1159 (1944);

The Silver Palm, 94 F. 2d 776, 777 (9th Cir. 1937) cert. den. 304 U.S. 576, 58 S. Ct. 1046 (1938).

The only showing in this case is that petitioners never did anything with respect to the fathometer except paint it. Under the authorities collected in Part III of this brief, that is no showing at all.

VI.

The Judgment Should Be Affirmed by Reason of the Condition of the Radio Direction Finder.

The function of a radio direction finder has been described. Essentially it is a device for locating one's position by taking directional bearings on beacons. In order to use it, it is necessary to have data with respect to the error of the particular machine on a particular ship in different directions. 1961 regulations, having the force of law, required that such data be obtained annually. They read as follows:

"§ 8.517 *Requirements for direction-finder.* (a) To be approved by the commission, as provided by § 8.516. . . .

* * *

"(b) The calibration particulars shall be checked at yearly intervals or as near thereto as possible. A record of the calibration of any checks made of their accuracy shall be maintained on board the vessel for a period of not less than 1 year from the date of the related action." [47 C.F.R. § 8.517(a) and (b)] .

There is no question, but that the only data on board was a table five years old [Rep. Tr. pp. 346-347], which nobody knew how to use [Rep. Tr. p. 243].

The court made the following finding with respect to the radio direction finder:

> "[N]o reasonably expected deviational error could account for the widely divergent and inconsistent fixes which the crew obtained. If the incorrect fixes obtained from the radio direction finder contributed to the grounding, these fixes were due to the negligence by the members of the crew and are not due to any failure to have an up-to-date deviation card aboard." [Find. 8, Clk. Tr. p. 849].

We respectfully submit that the finding that the wildly divergent and inconsistent fixes obtained were due to the negligence of the crew does not dispose of the matter.

The case is governed by the rule of *The Pennsylvania* [*The Pennsylvania v. Troop,* 86 U.S. 148, 19 Wall. 125 (1873)]. That rule is that an offending shipowner must prove that a statutory violation could not possibly have caused a casualty.

The E. Madison Hall, 140 F. 2d 589 (4th Cir. 1944), cert. den. 322 U.S. 748, 64 S. Ct. 1159 (1944);

The Denali, 105 F. 2d 413 (9th Cir. 1939), cert. denied 311 U.S. 687, 61 S. Ct. 65 (1949).

In both of these cases, as here, the vessel owner sought to limit liability for damages caused by stranding. In both, the court concluded the Pennsylvania

Rule was applicable. In *Denali,* this court, in reversing the lower court's judgment granting limitation, said:

> "It is not conceivable that the Congress intended to give to such wrongdoing shipowners the extraordinary relief of the limitation act, with a less burden of proof relative to the effect of their wrongdoings, than for other violations of statutes for the safety of life and property at sea. Hence the extreme burden of proof of the *Pennsylvania* and *Lie* cases, *supra,* rested on the company to show that its privity in and knowledge of the violation of the statute could not have contributed to the stranding. As shown it has not made such proof. We hold that the Steamship Company is not entitled to limit its liability to the owners of the cargo under the provision of the Limitation of Liability statute and that the district court erred in its findings and decision to the contrary." [105 F. 2d at 420].

Accord:

The Teaser, 246 Fed. 219 (3rd Cir. 1917); *New York P. & N. R. Co. v. Wilkins,* 257 Fed. 42 (4th Cir. 1919), cert. denied 249 U.S. 605, 39 S. Ct. 288 (1919); *The Martello v. The Willey,* 153 U.S. 64, 14 S. Ct. 723 (1894); *The Bolivia,* 43 Fed. 173 (E.D.N.Y. 1890), reversed on other grounds, 49 Fed. 169 (2nd Cir. 1891); *The M. M. Chase,* 37 Fed. 708 (S.D.N.Y. 1889); and, *Andros Shipping Co. v. Panama Canal Co.,* 298 F. 2d 720 (5th Cir. 1962).

Both Captain Slack, appellant's expert [Rep. Tr. p. 539], and our expert, Captain De Santi [Rep. Tr. p. 793], agreed that wthout the correction data required by law, the radio direction finder is useless.

It is hardly to be supposed that seamen would use an instrument carefully, when they know that the readings obtained from it are without value. The radio direction finder was the device which was being used to navigate at the time of the grounding: its inadequacy must be presumed to have contributed to the casualty. There is no evidence to the contrary: since the instrument was useless, the admitted negligence of the crew is not such evidence.

Summary and Conclusion.

This is a case unique for the pervading atmosphere of mismanagement, incompetence, and inattention to the essentials of maritime safety. It is a case where the fathometer is conceded to have been the immediate cause of stranding. It is a case where it is conceded that the instrument was in an appalling state of disrepair. It is a case where the court expressly found that the unseaworthiness of the ship existed with the privity of Appellant. It is a case where the evidence to support that finding is overwhelming. We respectfully submit therefore that the judgment should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JACK D. FUDGE